

BUILDING THE CONSTITUTION

This revisionary perspective on South Africa's celebrated Constitutional Court draws on historical and empirical sources alongside conventional legal analysis to show how support from the African National Congress government and other political actors has underpinned the Court's landmark cases. Standard accounts see the Court as overseer of a negotiated constitutional compromise and as the looked-to guardian of that constitution against the rising threat of the ANC. In reality, South African successes have been built on broader and more admirable constitutional politics to a degree no previous account has described or acknowledged. The Court has responded to this context with a substantially consistent but widely misunderstood pattern of deference and intervention. Although a work in progress, this institutional self-understanding represents a powerful effort by an emerging court, as one constitutionally serious actor among others, to build a constitution.

JAMES FOWKES is a former clerk of the South African Constitutional Court and studied law at the University of the Witwatersrand, Johannesburg, and Yale Law School. He is currently a senior researcher at the Institute for International and Comparative Law in Africa, University of Pretoria, South Africa.

CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

Series Editors

David Dyzenhaus *Professor of Law and Philosophy, University of Toronto, Canada*

Adam Tomkins *John Millar Professor of Public Law, University of Glasgow, UK*

Editorial Advisory Board

T.R.S. Allan, Cambridge, UK

Damian Chalmers, LSE, UK

Sujit Choudhry, Toronto, Canada

Monica Claes, Maastricht, Netherlands

David Cole, Georgetown, USA

K.D. Ewing, King's College London, UK

David Feldman, Cambridge, UK

Cora Hoexter, Witwatersrand, South Africa

Christoph Moellers, Goettingen, Germany

Adrienne Stone, Melbourne, Australia

Adrian Vermeule, Harvard, USA

Books in the Series:

Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa James Fowkes

Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law Jacob Weinrib

Reason of State: Law, Prerogative, Empire Thomas Poole

Bills of Rights in the Common Law Robert Leckey

The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, Translated by Lars Vinx, with an introduction and notes by Lars Vinx

Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom Janet L. Hiebert and James B. Kelly

Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel Yoav Dotan

Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse Jacco Bomhoff

Judges on Trial: The Independence and Accountability of the English Judiciary Shimon Shetreet and Sophie Turenne

Proportionality and Constitutional Culture Moshe Cohen-Eliya and Iddo Porat

The Politics of Principle: The First South African Constitutional Court, 1995–2005 Theunis Roux

The New Commonwealth Model of Constitutionalism: Theory and Practice Stephen Gardbaum

Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere Janet McLean

Judging Social Rights Jeff King

Proportionality: Constitutional Rights and their Limitations Aharon Barak

Parliamentary Sovereignty: Contemporary Debates Jeffrey Goldsworthy

Cambridge University Press
978-1-107-12409-7 — Building the Constitution
James Fowkes
Frontmatter
[More Information](#)

BUILDING THE CONSTITUTION

The Practice of Constitutional Interpretation
in Post-Apartheid South Africa

JAMES FOWKES

*Institute for International and Comparative Law in Africa,
University of Pretoria, South Africa*



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107124097

© James Fowkes 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication Data

Names: Fowkes, James, 1984-

Title: Building the constitution : the practice of constitutional interpretation in post-apartheid South Africa / James Fowkes.

Description: Cambridge [UK] : Cambridge University Press, 2016. | Series: Cambridge studies in constitutional law

Identifiers: LCCN 2016026762 | ISBN 9781107124097 (Hardback)

Subjects: LCSH: Constitutional courts—South Africa. | South Africa.

Constitutional Court. | Constitutional law—South Africa. | BISAC: LAW / Constitutional.

Classification: LCC KTL2620 .F69 2016 | DDC 342.68—dc23 LC record available at <https://lcn.loc.gov/2016026762>

ISBN 978-1-107-12409-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-12409-7 — Building the Constitution
James Fowkes
Frontmatter
[More Information](#)

For Michaela

Cambridge University Press
978-1-107-12409-7 — Building the Constitution
James Fowkes
Frontmatter
[More Information](#)

CONTENTS

	<i>Acknowledgements</i>	xi
	<i>Table of South African Cases</i>	xiv
1	Introduction	1
	A Beginning: <i>Makwanyane</i> Stories	6
	Beyond <i>Makwanyane</i>	19
2	Taking Reality (Legally) Seriously	26
	The Work of the Constitution-Building Court	30
	Realism, Law and Karl Llewellyn	33
	Strategy, Legal Legitimacy and Alexander Bickel	38
	Dworkin, Ackerman and the Relevance of Political Activity to Interpretation	41
3	Voting Rights, Politics and Trust	50
	Rereading <i>NNP</i>	51
	The Constitution-Building Court at Work: Structural Concerns in <i>NNP</i>	56
	Democracy and Trust	66
	Epilogue to <i>NNP</i>	74
	Consistency: <i>NNP</i> and the Rest of the Court's Voting Rights Jurisprudence	81
	Another <i>NNP v. ANC</i>	88
4	The Role of the Court: Standard Conceptions	95
	The Intentions of the Drafters	96
	Institutional Thinking during the Transition – the ANC	99
	Institutional Thinking during the Transition – the NP and Other Minority Groups	103
	The Court as an Actor in an Elite Pact	110
	Post-Apartheid Judging and Transformative Constitutionalism	121
	Bridge-Building	126

5	The Role of the Court: Constitution-Building	129
	The Constitution-Building Account and Newness	131
	Infrastructure	133
	The Public Status of Ideas	138
	An Illustration: HIV/AIDS Discrimination	142
	The Text and Its Questions: Constitution-Building as a Constitutional Argument	147
	Purposive Text and Results-Driven Constitutionalism	150
6	LGBTI Equality	156
	The Emerging Public Status of LGBTI Equality in South Africa	156
	The Two <i>National Coalition</i> Decisions: Criminalization and Immigration Law	163
	The Two <i>Fourie</i> Decisions: Same-Sex Marriage	168
	Decisions to Decide, and Not to Decide: Family Law for Unmarried Couples	178
7	Democracy	188
	<i>Doctors for Life</i>	190
	Extending the Lines: The Later Public Participation Cases	197
	Promoting Democracy within Parliament and Local Government Structures	208
	<i>UDM (2)</i> and the Brief Life of Floor-Crossing	216
	Epilogue to <i>UDM (2)</i>	227
8	Socio-economic Rights	233
	Rights and Newness	233
	Maximalism in Socio-economic Rights Cases: <i>Grootboom</i> , <i>PE Municipality</i> and <i>Joseph</i>	242
	Non-Intervention Decisions: <i>Soobramoney</i> , <i>Nokotyana</i> and <i>Grootboom</i>	252
	<i>Minister of Health v. Treatment Action Campaign</i>	270
	<i>Mazibuko v. City of Johannesburg</i>	287
9	Equality, Eviction and Engagement	301
	The Promise of Legislative Action: <i>Masiya</i> and <i>Volks v. Robinson</i>	303
	Deferring into Space: <i>S v. Lawrence</i> and <i>S v. Jordan</i>	312
	Meaningful Engagement: Adjusting the Constitution-Building Equation	325
	Engagement and Its Possibilities: From Eviction to <i>Prince</i> to the Future	340
	Conclusion	349
	<i>Bibliography</i>	356
	<i>Index</i>	384

ACKNOWLEDGEMENTS

Books, it seems, are like rolls of sticky tape: their owners often find themselves surprisingly attached to them, but until finished they are mostly an exercise in trying to find the end. And once finished, it takes a special kind of forensically archeological mind to have much interest in going back to identify the precise point where they began. This book may have begun in Marius Pieterse's course on Human Rights at Wits Law School in 2006, or while writing for Thaddeus Metz in the Wits philosophy department the following year, or during my time as a law clerk to Justice Johann van der Westhuizen at South Africa's Constitutional Court the year after that, or indeed after my arrival at Yale Law School a year later still. I'm not sure: I am, however, deeply grateful to all four.

It was, at least, at YLS that it took shape, and this book is owed above all to that institution and its generosity, of academic spirit and other things. It may be increasingly customary to be indebted to US law schools, but my debts are of the nicest kind. I owe them to the graduate programs office, to its mother, Maria Dino, its deans Toni Davis and her successor Gordon Silverstein, and to Steph D'Ambrose and Caroline Curtis; to Dean Robert Post; and to Yale's extraordinary librarians, not least for permitting me to check out portions of their South African collections sufficiently large to require returning by incredulous taxi. I owe them to teachers at YLS, including Akhil Amar, the late Robert Burt, Daniel Bonilla, Dieter Grimm, Frank Iacobucci, John Langbein, Jerry Mashaw, Nick Parrillo, Susan Rose-Ackerman, and Jim Silk, who although not directly involved in this book offered encouragement and afforded me, in various ways, the invaluable opportunity to watch them at work. I owe them to Ian Shapiro of Yale's Political Science department, who served on my doctoral committee and offered generous support and incisive criticism, and to my friends and colleagues in the Yale graduate community who had the misfortune to have parts of this book and, worse still, parts since deleted from this book, bounced off them, occasionally

with their consent. And I owe them to Bruce Ackerman, whose scholarly interest in the breadth and richness of constitutional real life first made me want to go to Yale, who I was to discover possessed kindness to match as supervisor to the thesis on which this book is based, and who taught me too to disagree, although it is possible that there at least he was casting for type.

Parts of my time at Yale were supported by the Fulbright program and by South Africa's Skye Foundation; my thanks to Mareka Chabedi, Neville Passmore, and to the private benefactors and US tax-payers who fund these scholarships for their extraordinary beneficence. Parts of this book were written, post-Yale, during time at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany, and the Institute for International and Comparative Law in Africa at the University of Pretoria, South Africa. I am grateful to the directors of the former, Anne Peters and Arnim von Bogdandy who extended my invitation, and of the latter, Erika de Wet and Christof Heyns, and to the people of both institutions. This book has also benefited enormously from other scholars and observers, inside South Africa and out, who have offered me help and support on this and other projects along the way, including David Bilchitz, Michael Bishop, Steve Ellmann, Heinz Klug, Gilbert Marcus, Alistair Price, Ngwako Raboshakga, Theunis Roux, who graciously shared with me an earlier manuscript of his *Politics of Principle*, Wojciech Sadurski, Kristen Stilt, Mia Swart, Alexei Trochev, Dave Watson, Emma Webber, Stu Woolman and two anonymous reviewers for Cambridge University Press. I am also grateful to Finola O'Sullivan and the staff at Cambridge University Press, and to the editors of this series, David Dyzenhaus, who first showed an interest in this project, and Adam Tomkins.

Book acknowledgements are necessary because vital scaffolding is otherwise invisible in the finished construction; for the unfinished project that is this book's author, the scaffolding remains in place, notwithstanding the dust and occasional unannounced buckets of cement. An array of teachers, co-clerks, colleagues, conference attendees and friends, over an array of beverages, have been kind enough to tell me when they thought I was doing something right, when I was definitely doing something wrong, and when I might be missing out on something interesting and useful, a tangle of conversations that adds up, I think, to an education. Some timbers have been especially durable: Mieke Krynauw, conversations with whom represent another candidate for this book's beginning; Abby and Simon Marcus, curators of cities;

ACKNOWLEDGEMENTS

xiii

David and Rachel Fowkes, purveyors of banter and bánh mì, whom I assure that any dreadful puns in the book are accidental; and the rest of my impressively expanding family, support structure from the beginning. None has been around longer than my parents: no-one did more to provision this particular journey of a thousand miles, and while it may be that such journeys begin with a single step, someone was holding both my doubtless chubby hands when I took it. And no-one spent more time living with this book than Michaela Hailbronner, there from beginning to end, who first wrote down its title in the snow on the bonnet of a blue Honda Civic, owner unknown, at the start of a New Haven winter on Bradley Street. Writing books side by side in shared rooms on three continents may not be the most efficient dating strategy for picking a partner for life, but it is one I would highly recommend. To her, now my wife and mother to a small Edward very effectively distracting me from these acknowledgements, this book is dedicated.

TABLE OF SOUTH AFRICAN CASES

A

- Abahlali Basemjondolo Movement SA v. Premier of the Province of KwaZulu-Natal* [2009] ZACC 31, 2010 (2) BCLR 99 (CC), 326
- African Christian Democratic Party v. Electoral Commission* [2006] ZACC 1, 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC), 59, 84, 94
- African National Congress v. Chief Electoral Officer* [2009] ZACC 13, 2009 (1) BCLR 971 (CC), 2010 (5) SA 487 (CC), 84
- Albutt v. Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC), 208
- AParty v. Minister of Home Affairs* [2009] ZACC 4, 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC), 59, 82–83, 85–86, 94, 178
- August v. Electoral Commission* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC), 58–59, 65, 80–82, 85, 87, 94, 134

B

- Bhe v. Magistrate, Khayelitsha* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC), 185, 192, 309

C

- Campus Law Clinic, University of KwaZulu-Natal, Durban v. Standard Bank of South Africa* [2006] ZACC 5, 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC), 243
- Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), 219
- Certification of the Constitution of the Province of KwaZulu-Natal* [1996] ZACC 17, 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC), 108
- Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), 97, 219, 221, 223, 237, 297
- Certification of the Constitution of the Western Cape* [1997] ZACC 8, 1997 (12) BCLR 1653 (CC), 93

TABLE OF SOUTH AFRICAN CASES

XV

- City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC), 253, 263, 327, 332, 334, 341
- City of Johannesburg v. Mazibuko* [2009] ZASCA 20, 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA), 294

D

- Democratic Alliance v. eThekweni Municipality* [2011] ZASCA 241, 2012 (2) SA 151 (SCA), 2012 (3) BCLR 291 (SCA), 198
- Democratic Alliance v. Masondo NO* [2002] ZACC 28, 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), 189, 208–13, 216, 226, 290, 296
- Democratic Party v. Government of the Republic of South Africa* [1999] ZACC 4, 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC), 9, 51, 56–57, 59–61, 81–82, 93–94, 226, 262–63, 296
- Doctors for Life International v. Speaker of the National Assembly* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), 149, 166, 171, 182, 188, 190, 192–203, 206–10, 212–13, 215–16, 225, 235, 245, 249–50, 269, 295, 301, 323, 329, 336, 341, 345
- Du Plessis v. De Klerk* [1996] ZACC 10, 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC), 103
- Du Toit v. Minister of Welfare and Population Development* [2002] ZACC 20, 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC), 172, 178–81, 184–85, 245, 327

E

- Electoral Commission of the Republic of South Africa v. Inkatha Freedom Party* [2011] ZACC 16, 2011 (9) BCLR 943 (CC), 84–85
- Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC), 121
- Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15, 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC), 93
- Executive Council, Western Cape v. Government of the Republic of South Africa* [1995] ZACC 8, 1995 (4) SA 877 (CC), 1995 (1) BCLR 1289 (CC), 81, 88–92, 94, 138, 154, 280
- Executive Council of the Province of the Western Cape v. Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v. President of the Republic of South Africa* 2000 (1) SA 661 (CC), 93

F

- First National Bank of South Africa Ltd t/a Wesbank v. Commissioner for the South African Revenue Services, First National Bank of South Africa Ltd. t/a Wesbank v.*

- Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC), 114
- Fourie v. Minister of Home Affairs* [2004] ZASCA 132, [2005] 1 All SA 273 (SCA), 170
- Fourie v. Minister of Home Affairs* [2003] ZACC 11, 2003 (5) SA 301 (CC), 2003 (10) BCLR 1092 (CC), 168, 181–82

G

- Glenister v. President of the Republic of South Africa (No. 2)* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC), 197, 235, 323
- Glenister v. President of the Republic of South Africa* [2008] ZACC 19, 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), 182
- Gory v. Kolver NO* [2006] ZACC 20, 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC), 178–80, 184–85, 187, 245, 310, 312, 327
- Governing Body of the Juma Masjid Primary School v. Essay NO* [2011] ZACC 13, 2011 (8) BCLR 761 (CC), 340
- Government of the Republic of South Africa v. Grootboom* [2000] ZACC 29, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), 54, 238, 241–46, 249, 251–53, 256, 263–64, 266–68, 270, 275, 290, 295–96, 299, 327, 341
- Gundwana v. Steko Development CC* [2011] ZACC 14, 2011 (3) SA 608 (CC), 2011 (8) BCLR 792 (CC), 248

H

- Harksen v. Lane NO* [1997] ZACC 12, 1998 (1) SA 300 (CC) 1997 (11) BCLR 1489 (CC), 143, 236
- Hassam v. Jacobs NO* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148 (CC), 309
- Head of Department, Department of Education, Free State Province v. Welkom High School; Head of Department, Department of Education, Free State Province v. Harmony High School* [2013] ZACC 5, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC), 207, 340–41
- Hoffman v. South African Airways* [2000] ZACC 17, 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC), 142–46, 150, 156, 163–64, 167, 193, 211, 270, 272, 276, 301–2, 321, 344

I

- Independent Electoral Commission v. Langeberg Municipality* [2001] ZACC 23, 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC), 65, 149
- Irvin & Johnson Ltd v. Trawler & Line Fishing Union* (2003) 24 Industrial Law Journal 565 (LC), 146

TABLE OF SOUTH AFRICAN CASES

xvii

J

- J v. Director General: Department of Home Affairs* [2003] ZACC 3, 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC), 178–79, 184
- Jaftha v. Schoeman; Van Rooyen v. Scholtz* [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), 247–48
- Joseph v. City of Johannesburg* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC), 242, 249–50, 256–59
- Joy Mining Machinery, A division of Harnischfeger (SA) (Pty) Ltd v. National Union of Metalworkers of SA* (2002) 23 Industrial Law Journal 391 (LC), 146
- Justice Alliance of South Africa v. President of the Republic of South Africa* [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC), 171

K

- Khosa v. Minister of Social Development, Mahlaule v. Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), 149, 240

L

- Liberal Party v. The Election Commission* [2004] ZACC 1, 2004 (8) BCLR 810 (CC), 59, 84, 94

M

- Machele v. Mailula* [2009] ZACC 7, 2010 (2) SA 257 (CC), 2009 (8) BCLR 767 (CC), 327, 334
- Masiya v. Director of Public Prosecutions (Pretoria)* [2007] ZACC 9, 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC), 303–6, 308, 312, 314, 316–17
- Matatiele Municipality v. President of the Republic of South Africa (2)* [2006] ZACC 12, 2006 (5) SA 47 (CC), 2007 (1) BCLR 47 (CC), 188, 190, 193, 197–99, 207, 211, 336, 338, 340
- Mazibuko v. City of Johannesburg* [2008] ZAGPHC 491, [2008] All SA 471 (W), 289
- Mazibuko v. City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), 234, 251, 256, 258, 270, 276, 287–99, 309–10, 317, 326, 331, 344
- Mazibuko v. Sisulu* [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297 (CC), 212–17, 225, 249
- Merafong Demarcation Forum v. President of the Republic of South Africa* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), 188, 197, 199–203, 205–8, 214, 295, 299, 336, 340–41
- MEC for Education in Gauteng Province v. Governing Body of Rivonia Primary School* [2013] ZACC 34, 2013 (6) SA 582 (CC), 2013 (12) BCLR 1365 (CC), 341

- Minister of Health v. New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC), 61
- Minister of Health v. Treatment Action Campaign (1)* [2002] ZACC 16, 2002 (5) SA 703 (CC), 2002 (10) BCLR 1075 (CC), 274, 278
- Minister of Health v. Treatment Action Campaign (2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), 237, 244, 270–87, 295, 296, 297, 298, 321, 344
- Minister of Home Affairs v. Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC), 168–75, 178–79, 181, 183–86, 190, 195, 258, 296, 305, 307, 309–10, 322
- Minister of Home Affairs v. National Institute for Crime Prevention and Re-Integration of Offenders (NICRO)* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), 59, 81–82, 85, 87, 94
- Mohamed v. President of the Republic of South Africa* [2001] ZACC 18, 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), 6
- Moise v. Greater Germiston Transitional Local Council* [2001] ZACC 21, 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC), 85
- Moseneke v. Master of the High Court* [2000] ZACC 27, 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC), 185, 309
- Moutse Demarcation Forum v. President of the Republic of South Africa* [2011] ZACC 27, 2011 (11) BCLR (CC), 188, 197

N

- National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), 165–67, 170, 172, 179–80, 184, 187, 193, 211
- National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 163–64, 166
- National Credit Regulator v. Opperman* [2012] ZACC 29, 2013 (2) SA 1 (CC), 2013 (2) BCLR 170 (CC), 114
- New National Party v. Government of the Republic of South Africa* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), 24, 50–56, 58–67, 69, 71–74, 77–79, 81–82, 84–87, 89–94, 124, 126, 134, 137, 139, 143, 146, 150, 153–54, 163, 170–72, 186–87, 190, 195–96, 209, 212, 215–16, 223–24, 226–27, 232, 235–36, 253–55, 262–63, 269, 280–81, 284, 287, 291, 296, 301, 310, 323
- Nokotyana v. Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, 2010 (4) BCLR 312 (CC), 243, 252, 256–64, 267, 276, 283, 296, 298, 319, 328, 346

O

- Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC), 328–30, 333, 335–36

TABLE OF SOUTH AFRICAN CASES

xix

- Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd* [2011] ZACC 35, 2012 (2) SA 337 (CC), 2012 (4) BCLR 372 (CC), 248, 330, 334
- Occupiers of Saratoga Avenue v. City of Johannesburg Metropolitan Municipality* [2012] ZACC 9, 2012 (9) BCLR 951 (CC), 332–33
- Occupiers of Skurweplaas 353 JR v. PPC Aggregate Quarries (Pty) Ltd* [2004] ZACC 7, 2012 (4) BCLR 382 (CC), 2005 (1) SA 217 (CC), 334
- Oriani-Ambrosini v. Sisulu, Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC), 2013 (1) BCLR 14 (CC), 212–15, 217, 225

P

- PFG Building Glass (Pty) Ltd v. Chemical Engineering Pulp Paper Wood & Allied Workers Union* (2003) 24 Industrial Law Journal 974 (LC), 146
- Pheko v. Ekurhuleni Metropolitan Municipality* [2011] ZACC 34, 2012 (2) SA 598 (CC), 2012 (4) BCLR 388 (CC), 326, 328
- Port Elizabeth Municipality v. Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC), 242, 246–49, 251, 259, 263, 295, 327–28, 332, 336, 339–40, 345
- Poverty Alleviation Network v. President of the Republic of South Africa* [2010] ZACC 5, 2010 (6) BCLR 520 (CC), 188, 198, 200, 205, 207, 339–40
- Premier of the Western Cape v. Electoral Commission* [1999] ZACC 6, 1999 (11) BCLR 1209 (CC), 93
- Premier, Western Cape v. President of the Republic of South Africa* [1999] ZACC 21 1999 (3) SA 657 (CC), 1999 (4) BCLR 383 (CC), 59, 93, 341
- President of the Ordinary Court Martial v. Freedom of Expression Institute* [1999] ZACC 10, 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC), 149
- President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC), 114
- President of the Republic of South Africa v. South African Rugby Football Union* [1999] ZACC 9, 1999 (2) SA 14 (CC), 1999 (7) BCLR 725 (CC), 93
- President of the Republic of South Africa v. South African Rugby Football Union* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), 93
- Prince v. President Cape Law Society of the Cape of Good Hope* [2002] ZACC 1, 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC), 344–46
- Prince v. President of the Law Society of the Cape of Good Hope* [2000] ZACC 28, 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC), 343
- Prinsloo v. Van der Linde* [1997] ZACC 5, 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC), 236

R

- Rail Commuters Action Group v. Transnet Ltd. t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), 235, 296, 323

- Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes* (2) [2011] ZACC 8, 2011 (5) BCLR 273 (CC), 338
Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC), 205, 335–38, 346
Richter v. Minister of Home Affairs [2009] ZACC 3, 2009 (3) SA 615 (CC), 2009 (5) BCLR 448 (CC), 59, 62–63, 82–83, 85–87, 94, 149, 178, 209, 235, 263–64, 342
Robinson v. Volks NO 2004 (6) SA 288 (C), 307

S

- S v. Jordan* [2002] ZACC 22, 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC), 301, 312, 316–20, 322–25, 343–44, 346
S v. Lawrence; S v. Negal; S v. Solberg [1997] ZACC 11, 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC), 312–16, 318, 323
S v. Makwanyane [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 6–10, 12, 14–17, 19, 21, 24, 26, 28, 35, 45, 50–51, 55, 71–73, 79, 81, 88–91, 94, 97–98, 134, 138, 140, 143–44, 146, 156, 163–64, 166, 168, 173, 187–88, 190–91, 233, 271, 301, 319, 323–25
S v. Pitje 1960 (4) SA 709 (A), 168
Satchwell v. President of the Republic of South Africa [2003] ZACC 2, 2003 (4) SA 26 (C), 2004 (1) BCLR 1 (CC), 178
Satchwell v. President of the Republic of South Africa [2002] ZACC 18, 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC), 172, 178–79, 182, 184, 186–87, 193, 304, 307
Sex Workers Education and Advocacy Taskforce v. Minister of Safety and Security [2009] ZAWHC 64, 2009 (6) SA 513 (WCC), 323
Shilubana v. Nwamitwa [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC), 342
Sibiya v. Director of Public Prosecutions, Johannesburg [2005] ZACC 6, 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC), 18, 81
Sibiya v. Director of Public Prosecutions, Johannesburg [2006] ZACC 22, 2006 (2) BCLR 293 (CC), 18, 81
Soobramoney v. Minister of Health, KwaZulu-Natal [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), 241, 252–55, 261, 264, 296
South African Police Service v. Solidarity obo Barnard [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195 (CC), 118
South African Property Owners Association v. Johannesburg Metropolitan Municipality [2012] ZASCA 157, 2013 (1) SA 420 (SCA), 2013 (1) BCLR 87 (CC), 202

T

- Tongoane v. National Minister for Agriculture and Land Affairs* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC), 190
Treatment Action Campaign v. Minister of Health 2002 (4) BCLR 356 (T), 272

TABLE OF SOUTH AFRICAN CASES

xxi

U

United Democratic Movement v. President of the Republic of South Africa (No. 1) [2002]
ZACC 33, 2003 (1) SA 488 (CC), 2002 (11) BCLR 1213 (CC), 216

United Democratic Movement v. President of the Republic of South Africa (No. 2) [2002]
ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), 82, 189, 216–19,
221–27, 232, 254, 262, 285, 291, 301

V

Volks NO v Robinson [2005] ZACC 2, 2005 (5) BCLR 466 (CC), 180, 187, 301, 303,
306, 308–12, 314, 316, 318, 320, 322, 324–25, 343–44